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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD RAUL GONZALEZ,

Defendant and Appellant.

B209187

(Los Angeles County Super. Ct.  
No. MA030355)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Lisa Chung, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant  
Attorney General, Kenneth C. Byrne and Tasha G. Timbadia, Deputy Attorneys General,  
for Plaintiff and Respondent.

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Defendant and appellant Richard Gonzales was convicted by jury in count 1 of attempted willful, deliberate, and premeditated murder in violation of Penal Code sections 664 and 187, subdivision (a).<sup>1</sup> In count 2, defendant was convicted of assault by a life prisoner in violation of section 4500. In both counts, the jury found defendant used a deadly or dangerous weapon (§ 12022, subd. (b)(1)), inflicted great bodily injury on the victim (§ 12022.7, subd. (a)), and had suffered a prior serious or violent felony conviction for murder (§§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)).

Defendant was sentenced to life in prison without the possibility of parole in count 2, plus a total of nine years in enhancements, including one year for the use of a weapon, three years for infliction of great bodily injury, and five years for the prior murder conviction. A life sentence imposed as to count 1 with enhancements totaling nine years was stayed pursuant to section 654.

In this timely appeal, defendant argues the evidence is insufficient to support the finding that the attempted murder in count 1 was willful, deliberate, and premeditated. He also contends testimony on the extent of the involvement of the Mexican Mafia prison gang in the charged offenses exceeded the scope of permissible expert testimony, and that if the issue is “waived” due to the lack of an objection, trial counsel was constitutionally inadequate for failing to object to the evidence. We hold the evidence was sufficient to support the verdict, defendant forfeited the right to challenge admission of the gang expert’s testimony by failing to object in the trial court, and the record does not establish that counsel was constitutionally inadequate. We therefore affirm the judgment.

## **FACTS**

Correctional Officer Robert Rey was working in a tower as an observation officer on August 15, 2004, at the California State Prison in Lancaster. At 2:45 p.m., he issued a “yard recall” over the public address system, which signaled the inmates to return to the

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<sup>1</sup> All statutory references are to the Penal Code, unless otherwise stated.

front of their housing units. He saw a commotion in front of Building 3 which involved three inmates. Officer Rey issued a “yard down” order. Two of the inmates continued the altercation, but he did not see what happened to the third inmate. One inmate was swinging violently while the other attempted to defend himself. Officer Rey did not see anything in the attacker’s hands. He saw Correctional Officer Francisco Arellano strike the attacker on his back with a baton twice before the attack ceased. Officer Rey did not recognize the inmates.

Officer Arellano was working as a search and escort officer. As inmates were being recalled from the yard, he saw two inmates—defendant and Montes—attacking inmate Joseph Salazar. At first he saw the inmates striking Salazar and Salazar defending himself. Salazar ran toward Officer Arellano’s location, and the officer saw that defendant had a flat metallic weapon in his right hand. Defendant continued after Salazar, but Montes ran to the other side of the yard. Defendant stabbed Salazar as he ran from him.

Officer Arellano struck defendant on the hip with his baton and ordered him to stop and drop the weapon. Defendant ignored the order and continued the attack as Salazar fell to the ground, with defendant stabbing Salazar in the back and head and kicking him. Salazar was covered in blood. Officer Arellano struck defendant with the baton a second time, after which defendant stopped the assault, looked at the officer, threw the weapon onto a handball court about six to ten feet away, and assumed a prone position on the ground. Officer Arellano ordered Correctional Officer Robert Watson to secure the weapon.

After defendant was handcuffed, Officer Arellano told defendant he should have stopped. Defendant asked why the officer hit him so hard. Defendant was smirking, as if he had no remorse. Generally after an attack, inmates will not make any comments and will have a blank stare on their faces. Officer Arellano had an interest in defendant before the attack, as defendant had influence on the yard as a “shot caller.” The Hispanic inmates have a structure that requires permission before acting, and defendant was

someone they would go to if they wanted to get things done. After the attack, defendant and Montes were cellmates in administrative segregation.

Officer Watson was on duty at 3:00 p.m. He heard an order to “get down” and saw defendant running toward Salazar, making downward thrusting motions. Salazar was attempting to protect himself. Officer Watson ran toward the incident without losing sight of defendant. He saw Officer Arellano strike defendant and tell him to get down as defendant continued to attack Salazar. Officer Watson observed that Salazar had a laceration of two to four inches on his arm, and it looked like someone had dumped a bucket of blood on his head.

After defendant was handcuffed, Officer Watson recovered what looked like a knife from the handball court about ten feet from Salazar. He put the knife in an envelope and placed it in his pocket. The knife, which had blood on it, sliced through the envelope, indicating it was very sharp. His report described the weapon as being five and one quarter inches long, one and one half inches wide, made out of flat metal stock, with about one-sixteenth of an inch sharpened to a point. No identifiable fingerprints were obtained from the weapon used by defendant.

Nurse Lavonne Pryor treated Salazar at the prison after the attack. He had between 17 and 20 wounds, including a three to four inch laceration across the top of his head that was bleeding profusely, a stab wound to the side of his chest, multiple lacerations, and a cut to his left forearm that went through three layers of skin. Due to Salazar’s condition, he was taken from the prison to Antelope Valley Hospital.

Salazar testified he did not know who attacked him. The day had been normal prior to the altercation. He suffered wounds to the head, arms, torso, and back, which were treated at the hospital. He told Correctional Officer Randall Clemons someone had stabbed him. He said he did not notice anything wrong that day, nor did he consider speaking to staff about his safety. He did not say defendant stabbed him because he owed money to the Mexican Mafia and his life would be in jeopardy if he identified the attacker.

Officer Clemons is assigned as a gang investigator with training and experience in the area of prison gangs. There were simultaneous assaults on August 15, 2004, involving two victims, Salazar and his cell mate. After a serious assault, the prison goes to lockdown with inmates restricted to their cells except for showers for up to 90 days. A simultaneous attack is utilized to try to avoid successive periods of lockdown.

One day after the assault, Salazar told Officer Clemons he had been transferred to Lancaster 60 days earlier as a result of being assaulted in another prison due to a drug debt he incurred to the Mexican Mafia. Salazar identified defendant and Montes as his attackers. Salazar told Officer Clemons that on the day of the assault, he became concerned for his safety as other gang members were staying away from him, as if they were aware of the impending attack. Defendant ran and attacked him as the inmates were called to return from the yard to their housing units.

According to Officer Clemons, defendant was a shot caller for the Mexican Mafia. He was a Mexican Mafia associate, validated by three sources as required by prison authorities. The attack on Salazar was a Mexican Mafia ordered assault. An inmate committing this type of assault makes a name for himself within the prison gang. Even though defendant was a shot caller who could have delegated the assault to another inmate, by committing the attack he improved his stature with the gang. The order to attack Salazar came from a Mexican Mafia leader who was incarcerated at Pelican Bay.

Defendant suffered a prior conviction for first degree murder on May 14, 1999. He was sentenced to 50 years to life.

## **DEFENSE**

Anthony Welsh was an inmate serving a sentence for murder at the Lancaster prison on August 15, 2004. A yard recall command had been given due to an incident involving two Hispanic inmates. Welsh heard a yard down order and then saw a bleeding inmate. Defendant was at the other end of the basketball court at the time of the incident. Defendant had not moved when the yard down order was given. When there is

a yard down order, the staff marks the location of each inmate on the yard on a diagram, which occurred on August 15.

Mario Ortiz was another inmate convicted of murder who was housed in the Lancaster prison on August 15, when there was a stabbing on the yard. The yard had been recalled when he saw movement. Defendant was by the basketball court at that time. After the victim was escorted from the yard, Officer Arellano came over and told defendant to get up and removed him from the yard. He did not recall being identified by location by an officer after the yard down order that day.

## **REBUTTAL**

The location of inmates during this incident was not diagramed as described by Welsch. This type of diagram is not mandatory.

## **DISCUSSION**

### **Admissibility of the Gang Expert's Testimony**

Defendant contends that Officer Clemons's testimony that the assault on Salazar was committed at the direction of the Mexican Mafia exceeded the proper scope of expert testimony, and the trial court erred in failing to limit the scope of the testimony. Defendant reasons that the testimony impermissibly commented on the ultimate issue of whether the attempted murder was willful, deliberate, and premeditated. Defendant argues the issue is not forfeited by trial counsel's failure to object or request a "curative instruction," because the failure to do so constituted ineffective assistance of counsel.

The argument is without merit for a variety of reasons. To begin with, no objection was made to Officer Clemons's testimony in the trial court. Issues pertaining to the admissibility of expert testimony on the subject of gangs are forfeited if not litigated in the trial court. (*People v. Ward* (2005) 36 Cal.4th 186, 211.) The issue of

permissible scope of Officer Clemons's testimony is therefore not cognizable on appeal. Defendant's attempt to create a sua sponte duty on the trial court to limit the scope of the testimony of Mexican Mafia involvement in the attack on Salazar is unsupported by case law and would place a burden on the trial court heretofore unrecognized under the law.

Equally unavailing is defendant's claim that trial counsel was ineffective in failing to object to the evidence. The trial record does not contain an explanation for counsel's failure to object. Under these circumstances, relief is not available on direct appeal and may only be obtained by means of a petition for writ of habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194.)

Defendant contends there is no conceivable tactical reason for trial counsel's failure to object, so he should not be limited to relief by habeas corpus. Defendant is incorrect, in that trial counsel is not required to make unmeritorious motions for the sake of preserving evidentiary issues. Officer Clemons's testimony established the motive for the assault on Salazar—Salazar had an unresolved drug debt to the Mexican Mafia and a gang leader ordered the attack upon him. The attack was perpetrated by defendant, a validated Mexican Mafia associate and shot caller at the Lancaster prison. Without evidence of the gang motivation, the attack would have been inexplicable in the eyes of the jury. "A motion to suppress this evidence would have been a classic exercise in futility." (*People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1003.)

Generally speaking, testimony regarding the culture and habits of criminal street gangs meets Evidence Code section 801, subdivision (a)'s criterion that expert opinion testimony is admissible when the subject matter is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." . . . [Citations.] (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) Defendant acknowledges that testimony by a qualified specialist in criminal gangs as to "an individual defendant's membership in, or association with, a gang" falls within the proper scope for expert testimony under California evidence law. (E.g., *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.)

“‘[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.’ (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85; see also *People v. Martin* (1994) 23 Cal.App.4th 76, 81 [gang activity or membership admissible where ‘important to the motive . . . even if prejudicial’].) [¶] Expert testimony repeatedly has been offered to show the ‘motivation for a particular crime, generally retaliation or intimidation’ and ‘whether and how a crime was committed to benefit or promote a gang.’ (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 657.)” (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; see also *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513.)

Finally, we point out that this is not a case, such as *People v. Killebrew, supra*, 103 Cal.App.4th at pages 657-658, in which the expert witness improperly testified to a defendant’s subjective intent in committing a crime. Officer Clemons did not testify that defendant’s conduct was willful, deliberate, and premeditated. Instead, based upon the types of evidence an expert may rely upon, he described the motivation for the attack on Salazar. As *Killebrew* recognizes, the “motivation for a particular crime, generally retaliation or intimidation,” is admissible. (*Id.* at pp. 656-657.)

### **Sufficiency of the Evidence**

Defendant next argues the evidence is insufficient to support the jury’s finding that the attempted murder of Salazar was willful, deliberate, and premeditated. Specifically, defendant argues that without the testimony of Officer Clemons explaining the motive for the offense, there was no evidence to support the special finding.

In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review “the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord,



*People v. Barnwell* (2007) 41 Cal.4th 1036, 1052.) The federal standard of review is to the same effect: under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) Where substantial evidence supports the trial court's finding, and other circumstances support a contrary finding, the trial court's finding will not be reversed. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

To the extent defendant's sufficiency of the evidence argument is premised on his related contention that Officer Clemons's testimony went beyond that permitted under the law, we have rejected the contention. We thus analyze the sufficiency of the evidence based upon the entire trial record, including Officer Clemons's testimony regarding the motive for the attack on Salazar.

A finding of deliberation and premeditation requires more than proof of intent to kill. The concept of deliberation involves careful weighing of considerations in forming a course of action. Proof of premeditation requires thought in advance of the violent act. Premeditation and deliberation do not require an extended period of time. Instead, the test focuses on the extent of reflection, which can happen rapidly. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

In general, courts look to three categories of evidence sufficient to support a finding of premeditation and deliberation—evidence of planning, motive, and method. (*People v. Raley* (1992) 2 Cal.4th 870, 887; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) “[W]hen evidence of all three types is not present, we require ‘either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.’ [Citations.]” (*People v. Raley, supra*, at p. 887.) These categories of evidence are descriptive and operate as an aid for review of whether the evidence adduced at trial supports an inference there was a preexisting reflection and

weight of considerations, as opposed to a rash impulse. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

There is evidence to support all three categories of evidence pointing to the existence of premeditation and deliberation. Defendant's conduct supports an inference of planning. He participated in a coordinated, simultaneous assault upon two inmates, which indicates preparation for his attack. His possession of a contraband weapon on the prison yard is also consistent with planning.

Defendant's motive was established by Officer Clemons, who described how the Mexican Mafia operates within the prison system, defendant's role in the gang's operation, and Salazar's debt to the gang.

Finally, the method of the attack was consistent with premeditation and deliberation. Defendant committed an armed, relentless attack on Salazar on the prison yard. His assault was undeterred by the first baton strike administered by Officer Arellano. The nature of the wounds was consistent with a deliberate attempt to kill, in that multiple wounds were inflicted to areas of the body that could have proved fatal.

Substantial evidence supports the finding of willful, deliberate, and premeditated attempted murder.

## **DISPOSITION**

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.